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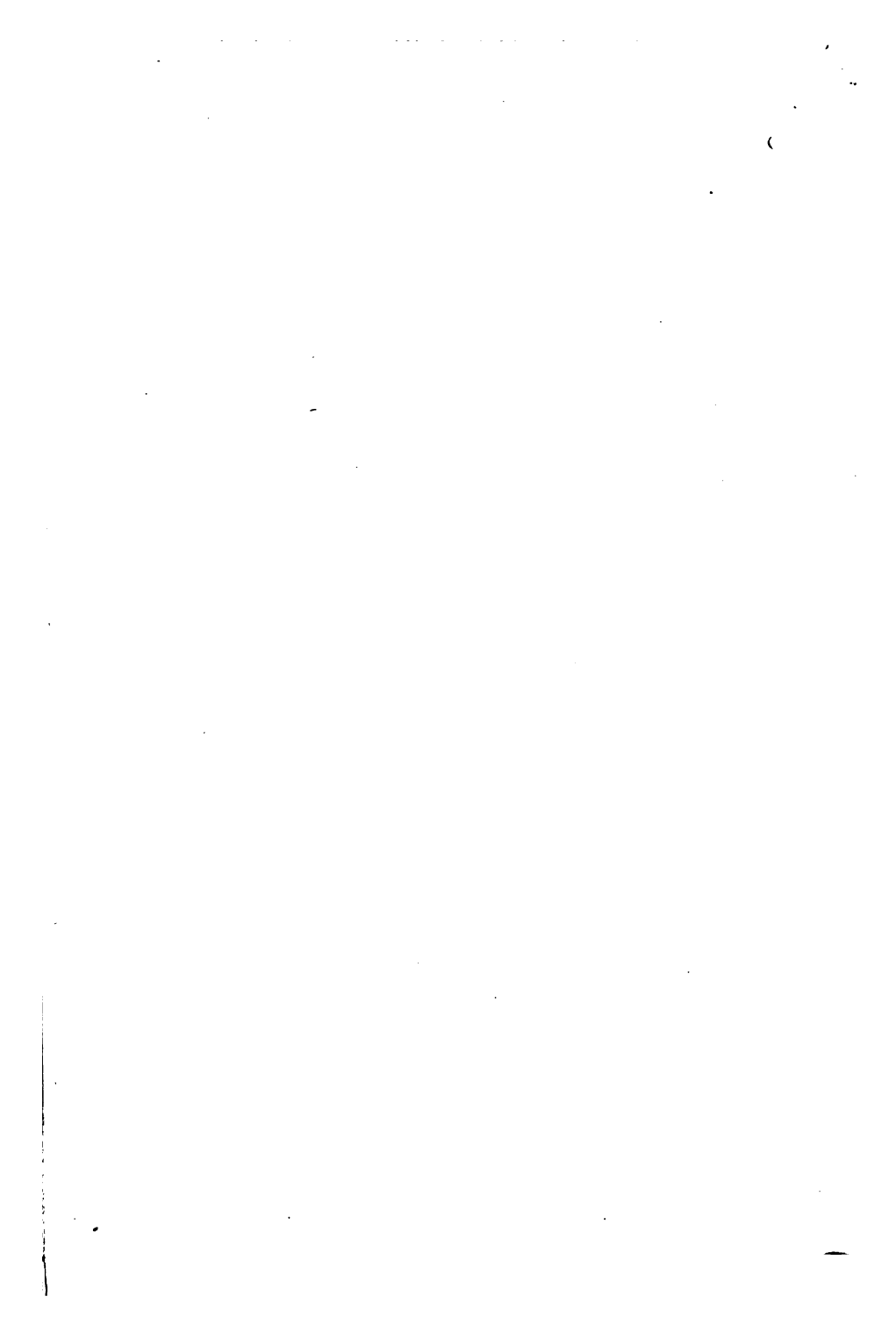
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THE LEGAL STATUS
OF
MARRIED WOMEN
IN
MASSACHUSETTS.

BY
GEORGE A. O. ERNST,
OF THE SUFFOLK BAR.

BOSTON:
MASSACHUSETTS WOMAN SUFFRAGE ASSOCIATION,
3 PARK STREET.
1895.

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TO
MY WIFE.

AT the Annual Meeting of the MASSACHU-
SETTS WOMAN SUFFRAGE ASSOCIATION, held
January 8, 1895, it was unanimously

“Resolved, — That we respectfully ask Hon. GEORGE
A. O. ERNST to allow this Association to publish his
Essay upon the Laws of Massachusetts affecting Women
as Wives, Mothers, and Widows.”

P R E F A C E .

SOME time ago I was invited to address the Massachusetts Woman Suffrage Association upon the Legal Status of Married Women in Massachusetts, and the following paper was written for that purpose. I have since read it before several Associations of Women, and am now asked to allow it to be printed.

In doing so, I wish to utter a word of caution. The paper does not pretend to be an exhaustive treatment of the subject, and, being written in a popular vein, is not intended to be used as a legal guide. It may, however, serve to call attention to the illogical condition of some branches of the law, and so lead to a change.

GEORGE A. O. ERNST.

BOSTON, March, 1895.



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MARRIED WOMEN

IN

MASSACHUSETTS.

THE people of this Commonwealth are subject to three kinds of law:—

First: The National Law, consisting of the Constitution of the United States, and Statutes enacted by Congress under the provisions thereof, affecting the country at large, or the relations between the States and their respective citizens; such, for example, as the tariff, the patent system, national banks, the post-office, interstate commerce, or the purity of the national suffrage, rarely touching upon the domestic relations.

Second: The Common Law, which our ancestors brought with them from England, and which forms the substratum of our system of State jurisprudence.

Third: The Constitution of Massachusetts, and such Statutes as are passed from time to time by our State legislature in modification of, and addition to, the Common Law.

The common law consists of those maxims and customs, found in early judicial decisions and legal treatises, which have been accepted as law from time immemorial, or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority.¹

The common law has received much undeserved praise from panegyrists. In many respects it is, of course, a noble institution, and embodies the thought and reason of many great minds; but it had its origin in an age of barbarism. It has passed through periods of ignorance and corruption. Much of it is derived from habits and customs no longer in vogue. A vast amount of the reasoning is wholly false, based upon false premises, and worked out with all the subtlety and sophistry that characterized the age of the so-called "schoolmen."

Douglas Campbell, in his interesting work upon the Puritan in Holland, England, and America, himself a lawyer, calls the common law a "system of a race of barbarians," and adds: "It must be borne in mind that the

¹ Blackstone's Commentaries, vol. i. p. 67.

men who conquered Britain and founded England were pagan savages, the rudest of their race, and least tinctured with the civilization of Rome. Cut off from the Continent, where much of the old civilization still survived, the descendants of these men lingered on in barbarism long after some of their brethren across the Channel. As for the law of the conquerors, it was such as might be expected from such a source. They knew and cared little about legal principles. Quite early they established the doctrine common to all rude nations, that what some chief or judge had decided years before, however monstrous or unjust, must be followed by his successors. This made memory take the place of reason. Under this system there grew up a jurisprudence cumbrous, complicated, and unnatural, which, in many of its features, will only excite amazement and derision among our descendants a few generations hence."¹

This language is, of course, somewhat intemperate; and it is doubtful if many lawyers trained in the common law would be willing to indorse it to its full extent. Although founded in barbarism, the advent of the com-

¹ Vol. i. p. 63.

mon law was a dawning civilization.¹ It was an attempt, not to substitute memory for reason, but reason for memory, and in theory, at least, the decisions of the early chief or judge were followed only so far as their reasons commended themselves to the judgment of those who cited them. Yet it cannot be denied that to-day the doctrine of blindly following the precedents without regard to their reason is adhered to, even in Massachusetts, to a considerable extent.

Our Supreme Court said, in a decision rendered not long ago (1891):² "We are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law, simply because the grounds of policy on which it must be justified seem to us to be hard to find, and probably to have belonged to a different state of society."

In the course of the opinion, the Court refers, among other ancient authorities, to the treatise of one Bracton, who is called by one of our

¹ For an intensely interesting account of the mode in which "the law has grown from barbarism to civilization," see *The Common Law*, by O. W. Holmes, Jr.

² *Dempsey v. Chambers*, 154 Mass. 330. This was a majority decision. See *Skinner v. Tirrell*, 159 Mass. 474.

leading law journals,¹ an "itinerant judge," "little better than a literary fraud." This "literary fraud" lived in the thirteenth century, but helps to decide a controversy arising in the nineteenth!

The practice of the Courts, however, is not always uniform in this regard. Judges are likely to be conservative or liberal, according to their own natural temperaments. They have been known to disregard ancient in favor of "modern authority,"² and upon occasion to intimate that legal doctrines, like a lady's dress, may change with the "fashion."³

In general, however, they feel bound to declare, not what the law ought to be, but what it is, leaving the question of its continuance to the legislature.⁴

In considering the status of woman, we must bear in mind this origin of the law. Her position is that which the common law gave her, modified from time to time by acts of the legislature. This modification is done piecemeal, and without any comprehensive

¹ American Law Review, July, 1892, p. 567.

² Commonwealth *v.* Trefethen, 157 Mass. 189; Berney *v.* Dinsmore, 141 Mass. 44.

³ Miller *v.* Hyde, 161 Mass. 478.

⁴ Gleason *v.* Boston, 144 Mass. 28.

grasp of the situation. Whenever a special grievance is brought to the attention of our legislators, they remedy it; but, in the absence of such special grievance, nothing is done, and the rules of the common law prevail. Every now and then the community is shocked by some cruel or absurd decision, sound enough as a matter of antique lore, but repulsive to the modern mind, and a rush is made to the legislature for relief. As a result, our law is a conglomerate, and even the proverbial "Philadelphia lawyer" would find difficulty in extracting from some parts of it anything like a principle.

There is little doubt but that most men to-day intend to be perfectly fair as regards women, and if they were now to establish an entirely new code, would endeavor to put the two sexes in all respects upon an absolute equality; but old prejudices die hard, and when our judges and our legislators have such a shield as the "glorious common law" to hide behind, it is not surprising that we have not yet reached the millennium.

Under the common law, woman had very few rights which man was bound to respect.

As a child she was completely subject to her father, as an adult to her husband. Her person, her property, and her children seemed perpetually in the care of, and under the restraint of, some man. She had no control whatever over her child. "A mother as such," says Blackstone,¹ "is entitled to no power, but only to reverence and respect." The father's right was held to be so much superior to that of the mother, that if she separated from him, even for cause, the Court would order their infant, then at her breast, to be delivered to him, though he was an alien, and at the time actually living illegally with another woman, unless she could make it appear that he intended to abuse his right.²

A husband might give his wife moderate correction by domestic chastisement, and could restrain her of her liberty in case of any gross misbehavior.³ In the old writ of "supplicavit," which came to be used for her protection, the Court would order that the husband "shall well and honestly treat and govern his wife, and that he shall not do, nor procure

¹ Blackstone's Commentaries, vol. i. p. 453.

² *Dumain v. Gwynne*, 10 Allen, 271 ; *King v. Greenhill*, 4 Ad. & El. 624.

³ Blackstone's Commentaries, vol. i. p. 444-5.

to be done, any damage or evil to her of her body, otherwise than what reasonably belongs to her husband for the purpose of the government and chastisement of his wife lawfully." ¹

In case she actually escaped from him by flight, he could apply to the Court for the restitution of his conjugal rights, and she was through the process of the Court "thrust back again to the bliss which had been too lightly prized." ²

Her personal property, whether acquired before ³ or after marriage, ⁴ became at once his, though bought by her from her own earnings. ⁵ The ring with which he married her became his the moment the ceremony was performed, and if sufficiently valuable, subject to the demands of his creditors. If, driven by his extreme cruelty, she abandoned his house, and, going to work, gathered together a little money from her own earnings, and deposited it in a savings-bank in her name, it was his money, and his creditors

¹ *Adams v. Adams*, 100 Mass. 370.

² *Bishop on Marriage and Divorce*, vol. i. § 29.

³ *Edgerly v. Whalan*, 106 Mass. 307.

⁴ *Commonwealth v. Manley*, 12 Pick. 175.

⁵ *Gerry v. Gerry*, 11 Gray, 381.

could take it to satisfy his debts.¹ He had the exclusive right to the use, occupation, and income of her real estate;² and if any part of the real estate was sold, or taken by the authorities for a public use, the entire proceeds went to him as personal property.³

Her condition, if he chose to make it so, was far worse than that of an average slave. If he killed her, it was as though he had killed a stranger. If she killed him, it was a species of treason, and she was drawn and burnt alive. "So great a favorite," according to Blackstone, "is the female sex of the laws of England."⁴

As early as 1633, the colony of Plymouth began to legislate in favor of woman and against the common law; but not until towards the middle of the present century did Massachusetts take hold in earnest. During the past forty years many statutes have been passed, by which the old Commonwealth has

¹ Ames *v.* Chew, 5 Metc. 320; McKavlin *v.* Bresslin, 8 Gray, 177.

² Clapp *v.* Stoughton, 10 Pick. 463; Bartlett *v.* Cowles, 15 Gray, 446.

³ Emerson *v.* Cutler, 14 Pick. 119. The law is otherwise now. Pub. St. ch. 142, § 9, and ch. 147, § 14.

⁴ Commentaries, vol. i. p. 445.

endeavored to do justice to woman, until now her legal status is, in some respects, superior to that of man.

As long as a woman remains single, her legal position is pretty much the same as that of man. She is, to be sure, not permitted to perform either military or jury duty, and her rights both of suffrage and office-holding are restricted. But the antiquated sneer against the "old maid" has long since lost its sting; and having demonstrated her capacity, the opportunity of taking care of herself is no longer either legally or practically denied her. It is only when she listens to the blandishments of the other sex that her troubles begin; but even here the law bears much more lightly upon her than ever before.

She is no longer a defenceless prey to man's lust. Until 1886, the "age of consent" was but ten years.¹ It is now sixteen years.² Seduction has been made a punishable crime,³ and the male "night-walker" may be (although in practice he rarely is) arrested and punished with his female companion.⁴

¹ Pub. St. ch. 202, § 27.

² St. 1886, ch. 305; St. 1888, ch. 391; St. 1893, ch. 466.

³ St. 1886, ch. 329.

⁴ Pub. St. ch. 207, § 29.

I shall not attempt to enter into all the minute details of the law. I shall confine myself to the following subjects in this order :

The right of a married woman, —

1. To her person.
2. To her children.
3. To her property, and herein of her right to contract, and do business on her own account.
4. The respective rights of husband and wife in the estate of the deceased spouse.

FIRST: *The right of a married woman to her person.* — A married woman to-day, in Massachusetts, has absolute and complete control of her person, except, of course, that her husband may use reasonable force to prevent her from committing a crime, as otherwise he may vicariously become criminally liable for her act.¹ Her legal domicil or home is the same as his, and follows him from place to place;² but practically she may come and go when and where she pleases. Her husband has no longer the right to restrain her in any way. Should she grow tired of his company, she may refuse to occupy the same room with him,

¹ Commonwealth v. Wood, 97 Mass. 228.

² Greene v. Greene, 11 Pick. 410.

and treat him as did one recalcitrant and irate matron, who openly announced that her liege lord was "nothing but a boarder."¹ Should she desire to leave his house, she may do so from the mere whim, without assigning any reason therefor. As is said in a recent decision:² "For a married woman to leave her husband without cause is not a great crime. It is legal if with his consent, and if against his will it is only illegal in the sense that if she keeps away from him for three years he may get a divorce."

If she has left him for justifiable cause and he undertakes to interfere with her she may apply to the Probate Court, which will prohibit him from imposing any restraint upon her personal liberty, and make such further order as it deems expedient, concerning her support, and the care, custody, and maintenance of their minor children, determining with which parent the children or any of them shall remain.³ Such application may be made immediately upon leaving him without any preliminary notice or demand.⁴

¹ Southwick *v.* Southwick, 97 Mass. 328.

² Tasker *v.* Stanley, 153 Mass. 150.

³ Pub. St. ch. 147, §§ 33-35.

⁴ Smith *v.* Smith, 154 Mass. 262.

A decree under this statute has, however, none of the elements of a judicial separation. It does not suspend the marriage status; it affects to a limited extent the rights and duties of the parties, but they remain in the marriage status as before, with all the rights and duties of husband and wife, except so far as they are modified by the decree; it does not authorize the wife to live permanently apart from her husband nor establish a relation which she has a right to maintain until she consents to change it; if her husband removes the cause of the separation, it would be her duty to return to him, and it would be the duty of the Court to revoke its decree.¹

A husband has no right to beat or strike his wife, even with the open hand, our Supreme Court having wisely decided that this is not one of the rights conferred on a husband by the marriage even if the wife be drunk or insolent.² If, notwithstanding, he persists in doing it, the Court may not only punish him by fine or imprisonment, or both, but may order him to recognize with sureties to keep the peace for any term not exceeding

¹ *Barney v. Tourtellotte*, 138 Mass. 106.

² *Commonwealth v. McAfee*, 108 Mass. 458.

two years.¹ At the expiration of that period, if his disposition has not changed, the Court would probably require him to recognize anew. If his misconduct arises from the habit of excessive drinking, the wife may give written notice to any person, requesting him not to sell or deliver liquor to her husband, and may recover from such person not less than \$100 nor more than \$500 as damages for any failure, within twelve months, to respect such notice.²

Of course all this sounds and in theory is well enough, but a brute is a brute, and no woman linked to a brute can be saved by the law. Resort to the Court is a poor enough remedy in any case, but where domestic troubles are involved, it requires something more than a legal enactment to mend a shattered idol, or cure a broken heart.

Moreover, Courts move slowly, and the remedy frequently comes too late. A blow may be struck, a murder committed in a second. It takes days and sometimes months to put the machinery of the law in motion.

SECOND: *Of the right of a married woman to her children.* — The law touching the care

¹ Pub. St. ch. 215, § 9.

² Pub. St. ch. 100, § 25.

and custody of a minor child seems at first blush to be somewhat unfair to the mother. The father, if living, and a fit person, is entitled to the custody and education of the child,¹ and only in case of the father's misconduct² or death is the mother entitled thereto.³

In theory there certainly is no question but that the rights of the parents in their children should at all times and in all respects be equal; and very likely, it might work well in practice. Such is the law in several of our States, and it does not seem as yet to have given rise to any trouble in its practical operation. Personally I can see no sound reason against it, and I should be glad if such were the law in Massachusetts, if only for its moral effect upon the husband; but there are at least plausible grounds for argument on the other side which in a paper like this ought to be stated.

If the law establishes a commission in any state or municipal matter, the member-

¹ Pub. St. ch. 139, § 4; *Commonwealth v. Briggs*, 16 Pick. 203.

² *Dumain v. Gwynne*, 10 Allen, 273.

³ *Horgan v. Pacific Mills*, 158 Mass. 404.

ship usually consists of an odd number, the majority in case of dispute controlling. A two-headed commission is a rare thing. In theory, marriage makes husband and wife one. So long as this theory corresponds with the fact, and the couple, living together, are in accord, it can make little practical difference in which the theoretical custody is vested. In case of a dispute between them, it is clearly for the child's interest that some one should have the authority to settle promptly all questions touching its welfare. Take, for example, the question of a child's education, where he shall go to school. The father feels that he should go to a public school, the mother insists that it shall be a particular private school. If neither yields, the result is a tie, and the child will go nowhere. If an outside umpire is called in, whether it be a mutual friend or the Court, the decision will rest upon this umpire, and not upon either parent, and their only equality will be the negative one of neither having anything to say about it. In the mean while, pending the umpire's decision, the unfortunate child is suffering for an education. The law, looking at the matter from the point of view of the

child's welfare, says that it is better that he should go even to a poor school than to none at all, and as some one must decide the question, that "some one" shall be the father.

This selection of the father is not necessarily an arbitrary one. It will be found that most laws have a reason back of them, more or less satisfactory, if one can only get at it. In this instance the foundation of course is in the *patria potestas*¹ of the ancient law. The more modern reason may be said to be the father's legal obligation to pay the bills. If, in the case just put, the father's wish that the child should go to the public school is overcome by the mother's preference for a fashionable and expensive private school, it is the father who must pay the \$250 or \$300 involved. It is no doubt true that the wife, by her work at home, earns the money just as really as does the husband by his work at the office or the shop; and it not infrequently happens that a wealthy wife pays all the bills; but, as a matter of strict common law, the husband was alone bound to the support of his wife and children, while the wife, no matter how rich or prosperous she might be, was

¹ Maine's Ancient Law, ch. v., p. 131.

under no legal obligation to contribute even a penny for the purpose.¹

The statute expressly puts the father's rights upon the condition that he is a fit person. If it is established that he is unfit, and the mother assents, or is herself found to be unfit, the Court may give the custody of the child to its guardian, who may or may not be the mother;² or if, after hearing, it appears that the child, if under fourteen, is growing up without education or salutary control, and in circumstances exposing him to lead an idle and dissolute life, or is dependent upon public charity, the Court may commit him to some suitable State or municipal institution.³ If, in the case last stated, there has once been a hearing upon the merits, at which the parents have had an opportunity to appear, their rights are practically gone, the question of whether the object of the commitment has been accomplished being left largely to the discretion of the board or officers to whose custody the child has been committed.⁴ If the parents volun-

¹ See *post*, page 51.

² Pub. St. ch. 139, § 4.

³ St. 1882, ch. 181, § 3; St. 1886, ch. 330; St. 1888, ch. 248; St. 1893, ch. 217 and ch. 252.

⁴ *Flora Wares*, Petitioner, 161 Mass. 70.

tarily surrender their child to a charitable institution under a contract not to seek to reclaim it, such contract is valid, and they cannot subsequently recover it. The Court has, and exercises, the right to inquire fully into the question of the whereabouts of the child, whether it is being treated kindly and affectionately, how it is being educated, and all matters concerning it, but the parents have no absolute legal right either to see the child or to know where it is. The question involved is not the rights of parents, but the welfare of the child.¹

In all controversies between the parents, which actually reach the Court, whether in the nature of divorce proceedings² or for separate maintenance,³ or in any case of actual separation,⁴ the rights of the parents are, in the absence of misconduct, held to be equal, and the happiness and welfare of the child is to determine its custody or possession.⁵ As a general rule, whenever Courts are called upon to act in such matters, they lean towards

¹ *Dumain v. Gwynne*, 10 Allen, 270.

² Pub. St. ch. 146, §§ 17 and 29.

³ Pub. St. ch. 147, § 33.

⁴ Pub. St. ch. 147, § 36.

⁵ Pub. St. ch. 146, § 32.

the mother, unless the welfare of the child is clearly the other way. Undoubtedly, there may be instances of flagrant injustice cited, where the decree of the Court has been wrongfully against the mother; but that arises from the inherent infirmity of all legal procedure. Courts are very human institutions, and a crusty, irritable¹ or incompetent judge works

¹ A notable instance of judicial wilfulness is found in our reports. A learned and able justice of the Supreme Court, now dead, who was at heart one of the kindest and gentlest of men, was, on the bench, often obstinate, irascible, and hard. Of him, even his eulogists were obliged to say that the tone of his mind was forensic rather than judicial; that he was impatient, a good hater, strong in his emotions, in his dislikes, and prejudices. 137 Mass. 591. When he was a justice of the Superior Court a case was tried before him, wherein his rulings were for the plaintiff, who obtained a verdict. The defendant carried the case to the Supreme Court, and the verdict was set aside. *Hoyt v. Mutual Benefit Life Insurance Co.*, 98 Mass. 539. By chance, when the case was again tried, the same judge was again presiding. He again ruled for the plaintiff, who again obtained a verdict, which was again set aside by the Supreme Court. s. c. 103 Mass. 79. By a strange coincidence (which might not happen once in a thousand times), when the case came up a third time for trial, he was again the presiding justice. Once more he ruled for the plaintiff, who once more obtained a verdict. Exceptions to the rulings were taken by the defendant, but the judge refused to allow them, because of certain alleged inaccuracies. The Supreme Court, however, again sustained the defendant, and administered this rather stinging rebuke: "To hold an inaccuracy so trifling, and so likely to escape the utmost vigilance, to be fatal, would be to render the remedy

havoc in all lines of litigation. Fortunately we have very few such judges in Massachusetts, and this is particularly true of the judges of the Probate Court. Many touching instances could be given of domestic tragedies averted, of reconciliations brought about, through their quiet and kindly intervention.

In dealing with this problem there is the further difficulty that no law can protect a woman against herself. The readiness with which women yoke themselves to men whom they know to be brutes,¹ the loyalty which they afterwards display, their unwillingness to resort to the Courts, their anxiety to protect their liege lords from punishment, are phases of human nature with which law cannot deal. The difficulty is a practical rather than a legal

provided by the statute valueless." S. C. 118 Mass. 178. This case was in Court about ten years! If the judge had been sitting in equity, or without a jury, it would not have taken quite so long, but it is difficult to see how the defendant's rights could have been preserved by any counsel, however eminent.

It is a singular fact that the counsel who finally won the case had been a member of the Supreme Court, and that his death, some ten years later, occurred within a very short time of that of the judge before whom the cases were tried. Their eulogies are published in the same volume of the Massachusetts Reports on succeeding pages. — Vol. 137, Supplement.

¹ For an illustration of this, see *Woman's Journal* of Feb. 23, 1895.

one. When matches are made in heaven, and have lost something of their sulphurous flavor, the problem will become less complex.

The statute provides that a father, or in case he has died without exercising the power, a mother may, by a last will in writing, appoint a guardian for their children, whether born at the time of making the will or afterwards.¹ This provision has been subjected to much adverse criticism, the complaint being that an unkind and cruel father may thus will away even his unborn child from the mother. This criticism is wholly unfair. The English statute,² construed in connection with the common law,³ did, and perhaps still does, give the father this right; but the Massachusetts statute does not.⁴ The English statute was never in force in this State.⁵ The guardian appointed by the father's will has no right to the care or custody of the child, which remains with the mother after the father's death, unless she is shown after due hearing to be unfit, in which

¹ Pub. St. ch. 139, § 5.

² St. 12 Car. II. ch. 24, § 8.

³ *Talbot v. Shrewsbury*, 4 Mylne & C. 683.

⁴ *Fuller's Massachusetts Probate Law*, 193.

⁵ *Wardwell v. Wardwell*, 9 Allen, 520.

case the welfare of the child very properly prevails. A guardian, as such, has not necessarily anything to do with the person of his ward. His sole duty is to take care of the ward's property, unless the parents are both dead, or unless the Court expressly awards him the custody. The purpose of the statute would seem to be to enable a father, in leaving property to his child, to appoint some one to take care of the property during the child's minority. He has no power by will, or otherwise, to disturb the mother's statute right to the sole custody and education of her child. After the husband's death a widow with minor children, who keeps the family together and supports herself and them with the aid of their services, has very much the same control over them and their earnings during their minority, and is subject to the extent of her ability to much the same civil responsibility for their education and maintenance, as a father.¹

THIRD: *Of the right of a married woman to her property, and herein of her right to contract and do business on her own account.*— Before entering into the marriage state the

¹ Horgan v. Pacific Mills, 158 Mass. 402.

parties may make contracts or agreements touching their respective estates, either by way of settlement¹ or under the statute.² If made under the statute, a schedule of the property intended to be affected thereby must be annexed, containing a sufficiently clear description of the property to enable a creditor to distinguish it from all other property, and both contract and schedule must, within ninety days after the marriage, be recorded in the appropriate registry of deeds. If not so recorded the contract is void, except as between the parties and their heirs and personal representatives.

After marriage, a wife having separate property may petition the Supreme Court, which will thereupon appoint a trustee to hold the same in trust for her;³ or she may establish a trust in her personal property independently of the statute.⁴

These methods of protecting a wife's property against her husband and his creditors are now rarely resorted to, for her rights have been so enlarged and are so clearly

¹ *Jenkins v. Holt*, 109 Mass. 261; Pub. St. ch. 147, § 15.

² Pub. St. ch. 147, §§ 26-28.

³ Pub. St. ch. 147, § 13.

⁴ *Pacific Nat'l Bank v. Windram*, 133 Mass. 175.

defined that there is no longer any necessity therefor.

During her lifetime, a married woman's right to her separate property, both real and personal, is absolute, provided she bears constantly in mind the cardinal principle that she must not have any direct business dealings with her husband.¹ He is the one person in the world whom she cannot legally trust. He is the only person whom the law allows to swindle her with impunity. No matter how solemn his promises, they are not legally binding upon him, if he is unable or unwilling to fulfil them.² Equity³ sometimes calls him to account, but not often enough to make it safe to trust him.⁴ If a woman lends her husband a sum of money, and takes his promissory note therefor, that note is absolutely void.⁵ She cannot safely lend money to a firm of which he is a member.⁶ If she does, and the firm declines to repay it

¹ *Keil v. Egleston*, 140 Mass. 203.

² *Bassett v. Bassett*, 112 Mass. 99.

³ *Holmes v. Winchester*, 133 Mass. 141.

⁴ *Turner v. Nye*, 7 Allen, 176; *Woodward v. Spurr*, 141 Mass. 283; *Deshon v. Wood*, 148 Mass. 132.

⁵ *Ingham v. White*, 4 Allen, 412; *Woodward v. Spurr*, 141 Mass. 283.

⁶ *Fowle v. Torrey*, 135 Mass. 87; *Clark v. Patterson*, 158 Mass. 388.

or goes into insolvency, she is without remedy; nor can she recover for services rendered by her to such a firm.¹ The old fiction of law still prevails that husband and wife are one person, and that one cannot deal with one's self.

This fiction is sometimes evaded in a very amusing manner. Thus, if a husband upon borrowing money from his wife gives a promissory note to a third person as trustee for the wife,² that third person can enforce the note against him for the benefit of the wife. In the same way although neither can transfer property directly to the other, yet if one conveys property to a third party, and that third party conveys it to the other, the transaction is valid.³ This is the common mode of conveying real estate from husband to wife, or *vice versa*. It can be done without difficulty, but requires two deeds instead of one, — a good thing at least for the lawyer, whose fees are thereby fattened.

While a woman's separate property is her own, she must keep it separate. If she allows

¹ Edwards *v.* Stevens, 3 Allen, 315.

² Spooner *v.* Spooner, 155 Mass. 52.

³ Motte *v.* Alger, 15 Gray, 322; Porter *v.* Wakefield, 146 Mass. 27.

it to be mixed with that of her husband it will become his.¹

She may, however, make him her agent² or trustee,³ and may place money in his hands with specific instructions to invest it for her, and those instructions will be binding in equity; but it must clearly appear that the transaction is one of trust, and not merely a loan or gift.⁴ The presumption is always against the trust,⁵ and the wife must be very careful to preserve the evidence, and to that end should see that the instructions are either in writing or are given before witnesses, as if given in privacy they become part of a private conversation between husband and wife, to which neither party can testify.⁶ A too trusting wife lost a substantial amount through this rule of law.⁷ She had saved up some money, which was her sole and separate property, and placed it in her husband's hands for

¹ *McCluskey v. Prov. Inst. for Savings*, 103 Mass. 300-306.

² *Duggan v. Wright*, 157 Mass. 232.

³ *Holmes v. Winchester*, 133 Mass. 141; *Springfield Inst. for Savings v. Copeland*, 160 Mass. 380.

⁴ Compare *Woodward v. Spurr*, 141 Mass. 283, with *Holmes v. Winchester*, 133 Mass. 141.

⁵ *Clark v. Patterson*, 158 Mass. 388.

⁶ *Dexter v. Booth*, 2 Allen, 559; Pub. St. ch. 169, § 18.

⁷ *Jacobs v. Hesler*, 113 Mass. 157.

the purpose of buying United States bonds. He promised her that he would so invest it, but, without her knowledge, used it in his business. The only persons present during the interview at which he received the money and made the promise were their five children, the oldest of whom was eleven years of age. Chief-Justice Gray said in the case, "The conversation between husband and wife appears to have been held in the presence of no other person except their family of young children, who are not shown to have taken any part in or paid any attention to the conversation. It must therefore be deemed incompetent evidence as a private conversation between husband and wife. This evidence being laid out of the case, it cannot be maintained. When a wife with her own hand pays money of her separate property to her husband there is no presumption that he receives it in trust for her. The money must be deemed to have been given to him with the intention that it should be applied to the use or benefit of either or both of them at his discretion." Thus the Court was forced to shut its eyes to the truth, and, solemnly presuming what it knew was not so, to connive at and uphold the husband's fraud.

The layman may be surprised when he is told that, in a later case,¹ the same Court decided that a conversation between husband and wife, held in the presence of a daughter fourteen years old, there being "nothing to show that she was not attending to it," was not private, and might be testified to. The distinction in principle is here rather hard to find, and the cases well illustrate the difficulty lawyers sometimes have in guessing at the law. If a conversation in the presence of a child eleven years old is private, and one in the presence of a child fourteen years old is not private, where between these ages is the line to be drawn?

The Supreme Court enunciated a profound truth when, in the same volume, and very nearly on the same day in which the preceding decision was rendered, it said: "Whether the result of a litigation depends upon the ascertainment of the facts by a jury, or upon the determination of the rules of law by the Court, in either case there is an uncertainty until the decision is reached."²

¹ *Lyon v. Prouty*, 154 Mass. 488 (decision rendered Oct. 24, 1891).

² *Prout v. Pittsfield Fire District*, 154 Mass. 452 (decision rendered Oct. 23, 1891).

It is not always easy to say just what property actually belongs to a married woman. The first acts of note enlarging her property rights were passed in 1855¹ and 1857,² and did not affect rights of husbands which had already vested.³ In the case, therefore, of a woman married prior to 1855, the husband would still own all personal property which had previously come to her, and would probably be still entitled to the enjoyment of her previously acquired real estate ; but all property, real or personal, which she has earned or purchased since 1857, or which has come to her in any form (except from her husband), whether by gift or inheritance, would be hers, free from his control and not subject to his debts.

Formerly the union of two persons in marriage extinguished all debts which either owed the other, but a more liberal and equitable rule is now in force. Neither can enforce a claim during coverture ; but the right is merely suspended and may be asserted at the termination of the marriage.⁴

¹ St. 1855, ch. 304.

² St. 1857, ch. 249.

³ *Edgerly v. Whalan*, 106 Mass. 307 ; *Cummings v. Cummings*, 143 Mass. 340-342.

⁴ *Martin v. Martin*, 146 Mass. 517 ; *Butler v. Ives*, 139 Mass. 202.

Gifts between husband and wife are generally void.¹ Gifts of personal property actually delivered by the husband to the wife, retained by her and unrevoked, become at his death her absolute property unless needed to pay his debts.² During his life her right in them is conditional and precarious; he may revoke the gift, and resume possession,³ or his creditors may seize them. The wife can maintain no action at law in relation to them in her name; they do not become her sole and separate property like gifts from other persons; but, after his death, his legal representatives cannot disturb her right to them save for the purpose of paying his debts. There may also be gifts in contemplation of death, what the law calls gifts *causa mortis*.⁴ These gifts and the wife's rights therein are substantially like those already described,⁵ with this important addition that they must be made in expectation of death. If the husband recovers,

¹ *Hawkins v. Providence & Worcester R. R. Co.*, 119 Mass. 599.

² *Marshall v. Jaquith*, 134 Mass. 138; *Spelman v. Aldrich*, 126 Mass. 113-117; *McCluskey v. Prov. Inst. for Savings*, 103 Mass. 302.

³ *Stimpson v. Achorn*, 158 Mass. 348.

⁴ *Whitney v. Wheeler*, 116 Mass. 490.

⁵ *Marshall v. Jaquith*, 134 Mass. 138-140.

the gift is void.¹ Neither class of gifts has any validity against creditors.

In 1879, a statute² was passed authorizing a wife to acquire by gift from her husband as her separate property, wearing apparel, articles of personal ornament, and articles necessary for her personal use, to a value of not more than two thousand dollars, provided that the gift is not in fraud of his creditors. Up to that time a husband was legally disabled from giving his wife even the dress she had on, as her absolute property.

Public attention was brought to the matter by a decision of our Supreme Court³ which held that a married woman could not sue a railroad company for the loss of a trunk full of her clothes, on the ground that they belonged not to her, but to her husband. The clothes were purchased by her with money from a fund formed by the joint earnings of herself and her husband. The Supreme Court in its decision said: "If the articles of clothing and personal ornament appropriate for her are purchased with his money, or upon his

¹ *Parish v. Stone*, 14 Pick. 198-204.

² St. 1879, ch. 133 ; Pub. St. ch. 147, § 3.

³ *Hawkins v. Providence & Worcester R. R. Co.*, 119 Mass. 596.

credit, the fact that they are selected and purchased by her and are intended for her personal and exclusive use does not render them any the less his property. The money with which she purchased the clothing appears to have been given to her by her husband from a fund made up of her and his earnings. We see no ground on which we can say that this joint fund or any part of it was her separate property. The money given her from that fund was her husband's money and not hers. There can be no valid gift of money or property by the husband to the wife. It would remain his property notwithstanding such gift."

Of course such a decision shocked the conscience and common-sense of the community, and the legislature thereafter enacted the law to which I have alluded, authorizing certain gifts to the extent of \$2000 from husband to wife.

Sensitive husbands have been heard to complain that the legislature did not at the same time authorize gifts from wife to husband; but in view of the decisions I have already cited such legislation would seem to be somewhat superfluous.

The exact force of the statute of 1879 has not yet been judicially determined. I should be glad to have each married woman who reads these words consider for a moment whether under this law the articles she is now wearing are or are not actually her property. In the first place, although bought with your money, were they bought in your husband's name? If bought with his money or in his name, has he actually given them to you? The statute says "may acquire by gift." Have you acquired them? If you are wearing a valuable ring or watch or other ornament as his gift, has it come to you since 1879? If you had it before 1879, has your husband since presented it to you? If not, is it yours or his? Since 1879, have you received from him more than \$2000 worth of wearing apparel, articles of personal ornament, and articles necessary for your personal use? What articles are necessary? Is the piano or guitar which your husband gave you last Christmas necessary? Is the diamond brooch, or the sapphire ring, or the India shawl, or the easy chair, or the oil painting, or the bit of Dresden china, which he gave you on your birthday or wedding anniversary,

necessary for your personal use? On the question of the meaning of the word "necessary," the Supreme Court has said:¹ "Articles are to be considered necessary which are suitable to the degree and condition of life of the person to whom they are furnished, having regard to the husband's estate, and are not to be confined to those which are required to sustain life or to preserve decency." But if the question ever arises, it will have to be passed upon by a jury which, however it may be cautioned by the Court, will be pretty apt to view the matter not in the light of your prosperity, but in that of your husband's misfortunes. What you and he may to-day regard as reasonable and necessary, may then seem to his creditors and to a jury an extravagant luxury.

Moreover, the statute limits the amount which you may acquire from him to \$2000. Does this mean \$2000 at one time, or \$2000 altogether? If the latter, have you already received your full quota, and is the next dress yours or his? A woman who receives from her husband \$400 a year in value, would require but five years within which to reach the statute limit; and those who started with

¹ *Hamilton v. Lane*, 138 Mass. 358.

the statute in 1879 have already long passed it if they have received but \$150 a year. These legal conundrums are still to be passed upon by the Courts as the occasion may arise.

To understand some of the dangers more clearly, let us take an illustration. A young man marries a rich girl. She prefers that he should have at least the appearance of taking care of his family, and with her consent, he receives her income and deposits it to his credit in his bank. She buys her dresses, her jewels, her furniture, her horses, and her carriages, but all in his name, and he pays the bills as they come in. Having been purchased "upon his credit" they are "his property"¹ although paid for with her money. He may of course formally "give" them to her, but she would very likely resent any such pretence of generosity on his part. Unless he does so, all, except her "necessary wearing apparel," are subject to his debts; and even if, for the sake of protecting her, he goes through the form of giving, she can only hold them to the extent of \$2000. A fashionable

¹ Hawkins v. Providence & Worcester R. R. Co., 119 Mass. 597.

equipage of horses, harness, carriages, robes, and livery will oftentimes alone reach that sum. Many a rich young matron unconsciously dances in her husband's ball-dress, sparkles with her husband's diamonds, rides home in her husband's carriage, not one penny of which was paid for by her husband's money, but any of which except the dress may be seized at any time by his creditors. The dress would probably be safe, under the statute exempting from execution "the necessary wearing apparel of himself, and of his wife and children."¹

This you will say is eminently unjust ; but it is an injustice which she deliberately brings upon herself. If she keeps her own bank account, her own box in the deposit vaults, buys in her own name, and pays with her own checks, as every woman should, she need never be troubled.² The law is clear, and if she does not follow it, she has only herself to blame. With the sign "Beware of the dog" staring her in the face, it is her own folly if she is bitten. Unfortunately, however, few women either see the sign or recognize the dog, when there is one, until it is too late.

¹ Pub. St. ch. 171, § 34, cl. 1.

² Pub. St. ch. 147, § 8.

With this exception as regards her husband and subject to his rights in her estate after her death, a married woman may enter into contracts of any kind,¹ may sue and be sued,² and may take, hold, manage, and dispose of her property, real or personal, without let or hindrance. She may occupy any position of trust, whether as executrix, administratrix, guardian, or trustee, and may bind herself and the estate she represents without any act or assent on her husband's part.³

She cannot, under the Massachusetts Constitution, occupy any judicial office, and can be neither a notary public⁴ nor a justice of the peace;⁵ although by statute, if she is an attorney-at-law, she may be appointed a special commissioner, with substantially all the powers of a justice of the peace.⁶ The Supreme Court at first decided that she could not be an attorney-at-law,⁷ but the legislature gave her the right.⁸

¹ Pub. St. ch. 147, § 2.

² Pub. St. ch. 147, § 7.

³ Pub. St. ch. 147, § 5.

⁴ Opinion of Justices, 150 Mass. 586.

⁵ Id. 107 Mass. 604.

⁶ St. 1883, ch. 252; St. 1889, ch. 197.

⁷ Robinson's Case, 131 Mass. 376.

⁸ St. 1882, ch. 139.

By express statute she may be an agent to aid discharged convicts,¹ an overseer of the poor,² a police matron,³ an assistant probation officer in the Municipal Court for the City of Boston,⁴ a prison commissioner,⁵ assistant physician at the State hospital,⁶ assistant register of deeds,⁷ member of the school committee,⁸ court stenographer,⁹ school teacher,¹⁰ and trustee of various public institutions; the Supreme Court having given it as its opinion that by the common law, which is our law upon the subject, a woman may fill any local office of an administrative character, the duties of which she is competent to perform.¹¹

All work and labor performed by a married woman, except for her husband and children, is, in the absence of an express agreement to the contrary, presumed to be on her separate account, and she alone is entitled to the proceeds.¹² Her wages for personal labor or ser-

¹ Pub. St. ch. 219, § 27.

² St. 1886, ch. 150.

³ St. 1887, ch. 234; St. 1888, ch. 181.

⁴ St. 1892, ch. 276.

⁵ Pub. St. ch. 219, § 1.

⁶ St. 1884, ch. 116.

⁷ St. 1885, ch. 7.

⁸ Pub. St. ch. 44, § 21.

⁹ St. 1885, ch. 291, § 4.

¹⁰ Pub. St. ch. 44, § 14.

¹¹ Opinion of Justices, 115 Mass. 602.

¹² Pub. St. ch. 147, § 4.

vices cannot be attached by trustee process in any suit against her husband;¹ and if, notwithstanding, any person wilfully causes, or aids and abets in causing them to be so attached, for the purpose of unlawfully hindering or delaying their payment, such person is liable to a fine not exceeding fifty dollars, to be paid to her.² She may carry on business on her separate account for her sole benefit, or may join any firm of which her husband is not a member;³ the only requirement being that she or her husband shall file a certificate of the facts in the clerk's office of the city or town in which she does, or proposes to do, such business. If this certificate is properly drawn and filed, the business and all property used in it are safe from her husband or his creditors.⁴

Here is a very decided advantage which a wife has over her husband. She is, perhaps, not likely to avail herself of it, but theoretically it exists. She may invest her property in mortgages, stocks, or bonds, or may establish and carry on a business on her separate

¹ Pub. St. ch. 183, § 29.

² Pub. St. ch. 183, § 32.

³ *Plumer v. Lord*, 5 Allen, 460.

⁴ Pub. St. ch. 147, § 11.

account, and may permit the income and profits to accumulate, investing and reinvesting, and need not contribute a penny to the support of herself, her husband, or her children.

Judge Devens, quoting from an English decision, says: ¹ "The children may want even the necessaries of life; they may want the means of proper education; the law does not throw on the mother the legal duty or obligation of maintaining, educating, or providing for the children." This is true though the father is in an almshouse, or is insane and personally unable to care for them.²

She may refuse to become liable even for her own clothes, although, of course, she may bind herself by special contract.³

In 1891, the injustice of this law, as regards the child, appealed so strongly to the legislature that it passed a statute ⁴ providing that the Probate Court, upon the application of a guardian charged with the custody of a minor child, might order and require either parent to contribute to its support and maintenance. This indirect and roundabout method is the

¹ Gleason *v.* Boston, 144 Mass. 27.

² Shaw *v.* Thompson, 16 Pick. 198.

³ Labaree *v.* Colby, 99 Mass. 559.

⁴ St. 1891, ch. 358.

only way in which a mother's property can be reached for the purpose. Even the pauper laws, which require the kindred of paupers to contribute to their support, and expressly name the line and degree of "mother and grandmother,"¹ have been construed by the Courts not to apply to married mothers and grandmothers.²

Her husband, on the other hand, is legally bound, even against his will, to support the entire household,³ providing rent, food, fuel, clothes, and all necessities, — "necessaries," under some circumstances, having been held to include a piano,⁴ a gold watch, a gold locket, a gold chain,⁵ a sewing-machine,⁶ medicines and medical aid,⁷ and the wife's reasonable "funeral expenses."⁸ The Court has, however, drawn the line at the services of a clairvoyant, and the husband need not pay for "the dreams,

¹ Pub. St. ch. 84, § 6.

² *Gleason v. Boston*, 144 Mass. 28.

³ This does not include his wife's children by a former marriage, unless he so chooses. *Livingston v. Hammond*, 162 Mass. 161.

⁴ *Hamilton v. Lane*, 138 Mass. 358.

⁵ *Raynes v. Bennett*, 114 Mass. 424.

⁶ *Wiley v. Beach*, 115 Mass. 559.

⁷ *Mayhew v. Thayer*, 8 Gray, 172.

⁸ *Cunningham v. Reardon*, 98 Mass. 538.

visions or revelations of a woman in a mesmeric sleep."¹ These, as the Court aptly remarks, are "fancy articles." If the husband declines to furnish these necessities as defined by the Courts, the wife has a right to contract for them in his name, and he cannot prevent it.² His salary, his business, and his property of all kinds are subject to these claims. His poverty and her wealth are not even considered by the Court in this aspect of the case. The old common-law obligation is upon him, and not upon her, and this even though they may be living separately.

If she leaves him without just cause, his obligation to support her and such children as she may take with her ceases;³ but if she is justified in leaving him, whether through his cruelty,⁴ or infidelity, or desertion,⁵ or other justifiable cause,⁶ she carries his credit with her, and he cannot prevent her from charging him with reasonable necessary expenses both

¹ *Wood v. O'Kelley*, 8 Cush. 406.

² *Eames v. Sweetser*, 101 Mass. 78.

³ *Sturbridge v. Franklin*, 160 Mass. 149; *Baldwin v. Foster*, 138 Mass. 449.

⁴ *Mayhew v. Thayer*, 8 Gray, 172.

⁵ *Hall v. Weir*, 1 Allen, 261.

⁶ *Eames v. Sweetser*, 101 Mass. 78.

for herself and for such of their children as may be living with her.

There is, however, this rather amusing limitation upon her right to use his credit. Although she may purchase these necessities upon his credit if she can find any one willing to supply her, yet she cannot borrow money in his name and buy the same necessities with the cash.¹ The reasoning of the Court in reaching this decision is perhaps satisfactory to a lawyer learned in the doctrines of subrogation, but would hardly be appreciated by a layman. It seems to be one of the cases where law and common-sense do not coincide.

No agreement by a wife releasing her husband from further obligation to support her is binding upon her, and notwithstanding such an agreement, she may have a decree for separate maintenance;² but it would relieve him from liability to those who furnish her with necessities.³

A husband who unreasonably neglects to provide for his wife's support and that of his minor children, may be punished criminally

¹ *Skinner v. Tirrell*, 159 Mass. 474 (a majority decision).

² *Silverman v. Silverman*, 140 Mass. 560.

³ *Alley v. Winn*, 134 Mass. 77.

by fine or imprisonment,¹ even though he is under age.²

If he leaves the State, or his whereabouts are unknown, and he has not made sufficient provision for their support, the Probate Court may, upon petition, appoint a receiver of all his property, who, under the directions of the Court, may apply the same to the purpose.³

If a married woman comes into this State from another State or country without her husband, he never having lived with her in this Commonwealth, she acquires all the rights and powers given to our own married women by our statutes, and may transact business, make contracts, sue and be sued, in her own name, and dispose of her property here precisely as if she were unmarried.⁴ If a couple, married in another State or country, come into the Commonwealth, and reside here as husband and wife, the wife retains all property rights which she already possessed by law or contract, and their subsequent rights and liabilities are the same as if they had married

¹ St. 1885, ch. 176; St. 1893, ch. 262; Commonwealth *v.* Ham, 156 Mass. 485.

² Commonwealth *v.* Graham, 157 Mass. 73.

³ St. 1894, ch. 203.

⁴ Pub. St. ch. 147, § 29.

at the time of their first residing together in this Commonwealth.¹

A married woman whose husband has absented himself from the Commonwealth, abandoning and not sufficiently maintaining her, or whose husband has been sentenced to confinement in the State prison, may, upon her petition, be authorized by the Supreme Court to dispose of her property, both real and personal, or such property as he acquired by the marriage and which remains within the Commonwealth undisposed of by him or to which he is entitled in her right, and to use the same or the proceeds during his absence or imprisonment as if she were unmarried, and such authority continues until the husband returns and claims his marital rights, or is discharged from prison.²

FOURTH: *The respective rights of husband and wife in the estate of the deceased spouse.* —

There are certain rights peculiar to the wife, of which I will first speak.

1. The right of quarantine; that is, the right to occupy the home free of rent, and to

¹ Pub. St. ch. 147, § 30.

² Id. ch. 147, § 31.

maintain herself therein from her husband's estate for forty days after his death.¹

2. The right to apply to the Probate Court for what is called the widow's allowance.²

3. The right of burial in her husband's tomb, or burial lot.³

The quarantine is, of course, intended for the wife's protection, and is effective as far as it goes. It prevents the heirs from turning the widow into the street immediately after the funeral. She has, at least, forty days within which to look around, during which time she may use such provisions and other articles as may be necessary for the reasonable sustenance of the family, and may expend money on hand at his death, to a reasonable amount, in the purchase of provisions and other necessities.⁴ But it does not go far enough. I can see no reason why a wife merely because her husband is dead should be deprived of her home, or be obliged to pay rent for it, at the expiration of forty days, or any other term short of her life. In my

¹ Pub. St. ch. 124, § 3, also ch. 135, § 2.

² Id. ch. 135, § 2.

³ St. 1883, ch. 262; St. 1885, ch. 302; St. 1892, ch. 165.

⁴ *Fellows v. Smith*, 130 Mass. 376.

opinion, no man should have the right, by will or otherwise, to deprive his widow of the privilege, should she care to exercise it, of living and dying in their common home. That place, at least, should be sacred to wife and mother.

There is, of course, the statute right of homestead, but that is limited in amount to \$800, and can only be acquired with her husband's active assent during his life.¹

The widow's allowance is something which lies largely in the discretionary power of the Judge of Probate.² Its purpose is to make a temporary provision for the widow,³ and its amount is to be small, merely enough to provide for her necessities and those of her minor children for a short time while they have an opportunity to adjust themselves to their new situation.⁴ It can only be paid from personal property, and not from the proceeds of real estate.⁵ When made, it takes precedence of debts, as well as of the expenses of the last sickness and of administration.⁶ It is to be paid,

¹ Pub. St. ch. 123. ² *Slack v. Slack*, 123 Mass. 443.

³ *Washburn v. Washburn*, 10 Pick. 374.

⁴ *Dale v. Hanover National Bank*, 155 Mass. 141.

⁵ *Hale v. Hale*, 1 Gray, 523.

⁶ *Kingsbury v. Wilmarth*, 2 Allen, 310.

though it consume the whole personal estate.¹ It is in addition to her articles of wearing apparel and ornament, which now by statute become hers.² It is an eminently humane provision as far as it goes.

In case of the appointment of a special administrator pending a controversy over the husband's estate, the Probate Court may make a reasonable allowance for the support of the widow and children out of the income of the estate both real and personal.³

The wife's right of burial at her husband's side in his tomb or cemetery-lot is something of comparatively recent date. Cemetery-lots and tombs are, in law, regarded as real estate,⁴ and after burial a dead body becomes a part of the ground to which it has been committed, "earth to earth, ashes to ashes, dust to dust."⁵ Upon his death, the husband's tomb or burial-lot descended like other real estate to his heirs or devisees. A widow, at common law,

¹ *Bush v. Clark*, 127 Mass. 111-114.

² Pub. St. ch. 135, § 1.

³ Pub. St. ch. 130, § 13.

⁴ Judge. Ruggles's Report in 4 Bradford, 522; Am. Law Reg. N. S. vol. xix. p. 69.

⁵ *Meagher v. Driscoll*, 99 Mass. 284.

was not an heir of her husband.¹ Her only common-law right in his real estate was her dower, which, as we shall see later,² was a life interest, and, of course, ceased at her death. A life interest in a tomb or burial-lot, if it existed, would be of little value. Unless her husband expressly provided for it in his will, or unless there were no issue, and she took it as a part of her statutory rights in his real estate, she had no legal right of burial therein. Attention is said to have been drawn to this matter through an actual controversy, which, however, never reached the Supreme Court, where children by a first wife refused to permit their step-mother to be buried by her husband's side in a lot which, at his death, had descended to them as his heirs. Accordingly, in 1883³ a statute was passed providing that "a wife shall be entitled to a right of interment for her own body in any burial-lot or tomb which her husband owned during their

¹ *Proctor v. Clark*, 154 Mass. 50. Under some circumstances she may be a statutory heir. *Lavery v. Egan*, 143 Mass. 392; *Lincoln v. Perry*, 149 Mass. 374; *Eastham v. Barrett*, 152 Mass. 56; *Holmes v. Hancock*, 158 Mass. 398; *Lawrence v. Crane*, 158 Mass. 392.

² *Post*, p. 67.

³ St. 1883, ch. 262.

married life." But the right to be buried is one thing, and the right to remain buried seems to be another. Whether there was actually an attempt thus to evade the provisions of the law, I do not know; but in 1885,¹ it was provided that the widow should have not merely the right of interment, but the further "right to have her body remain permanently interred or entombed therein," unless a removal should be made to "some other family-lot or tomb, with the consent of her heirs." Exactly how she is to enforce this right "to remain permanently interred or entombed," the statute does not say.

In the same act it is provided that the widow, or if there are children, the widow and children together, shall have the possession, care, and control of the lot during her life. This statute of 1885 applies only to incorporated cemeteries and to tombs in public cemeteries in cities. In 1892 the Legislature broadened its provisions to cover "all lots and tombs in public cemeteries in towns."² It would seem as if here there might still be a possible loophole. The statutes expressly recognize the right of any person to erect a tomb on

¹ St. 1885, ch. 302.

² St. 1892, ch. 165.

private land for the exclusive use of his own family,¹ and there are instances in the country of private burial-lots. There are also tombs in churches.² As to all these, the only statute protecting the wife's rights is the original act of 1883, and that does not give her rights of possession, care, or control during her life, nor of permanent burial after death.

This succession of statutes well illustrates the disjointed and incomplete way in which our legislation is made. The evil was seen in 1883, and it would seem that it has not yet been completely guarded against. Moreover, no provision whatever has been made giving a husband a corresponding right of burial in his wife's lot or tomb. If her children or next of kin object, he cannot be buried therein by his wife's side. His curtesy, as we shall hereafter see,³ is just as much a life interest as her dower, and gives him no greater rights after death.

It may not be uninteresting in this connection to briefly refer to some other matters in

¹ Pub. St. ch. 82, § 18. See also St. 1884, ch. 186.

² *Sohier v. Trinity Church*, 109 Mass. 1.

³ *Post*, p. 68.

relation to marital rights of burial. It is the husband's right and duty to bury his deceased wife, although the expense thereof must be borne by her estate, and he can recover from her executor such necessary and reasonable sum as he may have paid.¹

The general doctrine laid down by Massachusetts Courts seems to be that there can be no ownership in a dead body.² When a body has once been buried, no one has the right to remove it without the consent of the owner of the grave, or leave of the proper judicial authority, which, in Massachusetts, is the Supreme Judicial Court sitting in Equity. But if a husband, "in great distress of mind, worn out by the care of his wife during her last illness," consents, "though much against

¹ *Constantinides v. Walsh*, 146 Mass. 281.

² Our statutes punish any officer who takes a dead body upon mesne process or execution (Pub. St. ch. 207, § 46), but do not specifically exempt it from being taken. The maximum penalty is only \$500 fine or six months in jail. The dead body of Sir Philip Sidney was attached in London and denied Christian burial for over three months, because of his financial embarrassments. (Symonds' *Life of Sidney*, English Men of Letters Series, edited by John Morley, pp. 174-5.) In view of such a possibility, however remote and improbable, ought not our law to be drawn much more carefully and the penalty for its violation be at least a term in State's Prison?

his own wishes and feelings," to her burial in a lot not his own, the Court will subsequently permit him to remove the body to his own lot, in spite of the objection of her next of kin.¹

No case has arisen in Massachusetts which undertakes to state what may or may not be the corresponding right of a wife to bury or remove her husband's body. Should such case arise, there is little doubt but that she would be accorded substantially the same rights.

In Pennsylvania, however, it has been held (whether the law is still the same or not I do not know²) that a widow has no right nor control over the body of her deceased husband after burial.³ In this case the husband had accidentally shot himself, and the wife, frantic with grief, declared that his body "should never be buried at all, but that it ever should remain with her. Her nerves were wrought up to the highest state of excitement, and consequently her reason for the time was almost shattered." In this state of mind, his relatives begged her to consent to the burial of her husband in his

¹ *Weld v. Walker*, 130 Mass. 422. See also same case in its early stage, reported in 14 *Amer. Law Review*, p. 57.

² *Lowry v. Plitt*, 2 *Weekly Notes of Cases*, 675.

³ *Wynkoop v. Wynkoop*, 42 *Penn. St.* 293.

mother's cemetery-lot, agreeing, "for the sake of soothing her," that it might subsequently be removed, should she so desire. The mother, in whose lot he was buried, denied making any such agreement, but admitted that it was made by others of his relatives. Later the wife desired to remove the body, and upon the mother's refusal to permit her to do so, applied to the Court for relief. The Court declined to aid her, holding that whatever rights she might have had as administratrix terminated with the burial, and that as widow she had no right after the interment. The very profound judge who wrote the opinion says, with matchless logic: "Suppose a woman has had three husbands who have all died leaving her a widow, is she to be burdened with the duty and vested with the charge of their three bodies against the expressed wishes of the blood relations and next of kin of each?" There was no pretence that this widow had had three husbands, but if she had, she had done nothing illegal in marrying them. Our Supreme Court did not have to descend to such puerilities in deciding in favor of the husband in *Weld v. Walker*, above cited.

In Rhode Island it has been held¹ that, where the husband's body was buried with his wife's consent in a lot which he owned, but which at his death became the property of his daughter, the wife could not subsequently, against this daughter's wishes, remove the body to a lot which belonged to herself. The wife having already actually removed the body, the Court said, "We think it should be restored to the place whence it came."

This difference of treatment by the different Courts of husband and wife under similar circumstances may be a mere coincidence, but it is interesting, and upon a less grave subject would be amusing.

In Massachusetts the right to select the burial place carries with it (at least, so far as the husband is concerned) the right of placing over the spot a proper monument or memorial. Not even a mother-in-law can interfere with this right. In a case which has found its way into our Massachusetts reports,² a mother, after waiting three years for her son-in-law to act, proceeded without his knowledge or consent to erect a stone over her daughter's grave. As

¹ *Pierce v. Proprietors Swan Point Cemetery*, 10 R. I. 227.

² *Durell v. Hayward*, 9 Gray, 248.

soon as the dilatory husband learned the fact, he promptly removed the stone and erected in its place one of his own choice. The mother-in-law brought suit against him, but the Supreme Court said that he was justified in his conduct, as the mother had "no right to erect a stone at the grave" of her daughter without the husband's knowledge or consent.

The Statute of 1885, chap. 302, gives the widow and children the right to erect a monument, and make permanent improvements, upon a lot in their possession and control; but, as we have seen,¹ this statute is limited in its scope, and as to those lots outside the statute the widow would seem to have no such right.

Under the common law, a wife was entitled to dower² in her deceased husband's estate, while the husband was entitled to curtesy³ in his deceased wife's estate.

Dower was a life interest in one-third of all real estate of which the husband was seized during marriage, whether in possession or not (with certain exceptions, like a castle built for the defence of the realm), of which any issue

¹ *Ante*, page 61.

² 2 Blackstone's Commentaries, p. 129.

³ *Id.* p. 126.

which she might have had might by possibility have been heir. The statutes also except wild land.¹

Curtesy was a life interest in all real estate of which the wife was seized in actual possession during the marriage, which their issue, if born alive, would be capable of inheriting, and this would seem to include wild land.

A wife was entitled to her dower in any event, without regard to the question of whether there were or were not children the fruit of the marriage. A husband was entitled to his curtesy only in case there was a child born alive. If there was no child, or if it was still-born, he had no interest whatever in the real estate. If, however, the child breathed but a single breath, although it immediately thereafter died, the husband's curtesy attached. "Some have had a notion," says Blackstone, "that it must be heard to cry; but that is a mistake. Crying, indeed, is the strongest evidence of its being born alive; but it is not the only evidence. The issue also must be born during the life of the mother, for if the mother dies in labor, and the Cæsarean operation is performed, the husband in this case shall not

¹ Pub. St. ch. 124, § 4.

be tenant by the curtesy, because at the instant of the mother's death he was clearly not entitled, as having had no issue born, but the land descended to the child while he was yet in his mother's womb: and the estate being once so vested shall not afterwards be taken from him."¹

This is a sample of the "reasoning" of the common law. It also accounts for the anxiety of the fathers of old to have a child born to them as soon as possible after marriage, and the loss of affection which sometimes occurred in childless marriages.

The alleged reason for the difference between the rights of husband and wife in the other's real estate may be briefly explained.

The wife's dower was theoretically for herself, the husband's curtesy was in theory not for himself but for the child of which he was the natural guardian. It was to keep alive the inheritance, and so only attached to such real estate as the child might inherit; but the right, once attached, was not lost by the child's death, and for this purpose a single breath or a cry was as good as three score and ten.

While we may accept, we cannot respect

¹ 2 Blackstone's Commentaries, p. 127.

this reason. It was simply a legalized grab, made possible because men were in control, in an age when might meant right. This is shown from the further provision that a wife had no dower in real estate held in trust for her husband's benefit, while the husband did have curtesy in real estate held in trust for his wife's benefit. Lord St. Leonards, in commenting upon this anomaly, says somewhat caustically: ¹ "The rule would probably have been the converse of this had women instead of men presided in the Court of Chancery."

These rights of dower and curtesy exist to-day; but the rights of both parties have been somewhat enlarged by statute. The male legislator, ignorant perhaps of its origin, saw no justice in a law which punished thus severely his failure to beget offspring, and has therefore provided that even if no child is born, the husband shall be entitled for life to one-half of all rights by the curtesy.² Why he hit upon one-half instead of one-third, or why the wife's interest in his estate was not at the same time placed upon an entire instead

¹ Sugden on Powers, 8th Ed., ch. 1, § 1, p. 22.

² Pub. St. ch. 124, § 1; St. 1885, ch. 255.

of a partial equality with his in hers, is only to be explained by the fact that men alone make the laws. The law would probably have been otherwise had women the right either to vote or to legislate.

In the absence of a will, the rights of the respective parties in the estate of the deceased are as follows : —

First: *Personal property.*

If there is issue, the husband takes one-half,¹ the wife takes one-third.²

If there is no issue, the husband takes the whole, the wife takes the whole up to \$5000, and one-half of all over \$10,000.³

If there is no issue nor kindred she then takes the whole without limit in amount.⁴ But if there is a relative however remote, this relative takes one-half away from the wife even though he is an absolute stranger, whose existence has been hitherto unknown.

Second: *Real property.*

If there is a child born alive which might have inherited, the husband has his curtesy; if there is no child born alive, he has one-half

¹ St. 1882, ch. 141.

² Pub. St. ch. 135, § 3.

³ Pub. St. ch. 135, § 3.

⁴ St. 1885, ch. 276.

curtesy; if there is no issue alive at the wife's death, he takes in addition not exceeding \$5000 in value, absolutely; and if there is no issue nor kindred, he takes all absolutely.¹

The wife has her dower, her quarantine, and her right of burial, all without regard to the birth of a child. If there is no issue alive at her husband's death, she takes in addition not exceeding \$5000 in value absolutely, and, unless within six months after the date of letters of administration she elects otherwise, she takes, instead of dower, a life interest in one-half of such other real estate as he may have owned at his death.² If there is no issue (including herein children by adoption³) and no kindred, she takes all absolutely.

If she prefers, she may waive the right which the statute gives her to one-half, merely taking her dower or one-third. This sounds, upon its face, absurd; but it must be remembered that the one-half which the statute gives applies only to such real estate as her husband owned at his death, whereas dower attaches to all real

¹ Pub. St. ch. 124, § 1; St. 1887, ch. 290.

² Pub. St. ch. 124, § 3.

³ *Buckley v. Frasier*, 153 Mass. 525.

estate he at any time owned during their marriage. If she has not already relinquished her dower therein, her third might actually amount to much more than one-half,¹ a paradox which would have delighted Gilbert and Sullivan.

A widow may have her dower, or other interest in her husband's real estate specifically set off to her at any time within twenty years after her husband's death, or if at the time of his death she is absent from the Commonwealth, a minor, insane or imprisoned, at any time within twenty years after such disability ceases ;² or she may continue to occupy the lands with the heirs or devisees, or to receive her share of the rents, issues or profits thereof, so long as the heirs or devisees do not object ;³ but to protect her rights the joint occupation and enjoyment must be continuous.⁴ It is safer for her to enter into some special arrangement by deed duly recorded, or to petition to have her interest assigned to her as soon after her husband's death as conveniently may be.

A husband may release to third parties his

¹ *Matthews v. Matthews*, 141 Mass. 514.

² Pub. St. ch. 124, § 14.

³ *Id.* § 13 ; *Hastings v. Mace*, 157 Mass. 499.

⁴ *O'Gara v. Neylon*, 161 Mass. 140.

rights in his wife's real estate by any written consent, and not necessarily by deed.¹ A wife may release to third parties her rights in her husband's real estate including her right of burial,² either by deed, or by assenting to a jointure settled upon her, or a pecuniary provision made for her benefit and in lieu of dower before her marriage.³ Such jointure or pecuniary provision made after marriage, or made before marriage and without her assent, nevertheless bars her dower unless within six months after her husband's death, or, should he die while absent from her, within six months after notice thereof, and in all cases within six months after notice of the existence of such jointure or provision, she elects to waive the same.⁴

The husband, if competent and willing, is in all cases entitled to the administration of his wife's estate, unless her will prevents. The wife is only entitled to the administration of her husband's estate in case "the Probate

¹ *Cormerais v. Wesselhoeft*, 114 Mass. 550; Pub. St. ch. 147, § 1.

² St. 1883, ch. 262.

³ Pub. St. ch. 124, § 6 *et seq.*

⁴ Pub. St. ch. 124, § 9.

Court may deem fit,"¹ or the husband so provides by will.

Both husband and wife may make wills² disposing of their real and personal estate, but with certain limitations.

Under a statute passed in 1892 a will of either party made previous to marriage is revoked by the marriage unless it appears from the will itself that it was made in contemplation of marriage, or unless it is made in exercise of a power of appointment which otherwise would be unexercised.³ By the Public Statutes⁴ no child nor issue of a deceased child can be disinherited by the will of either father or mother, unless provision is otherwise made for him, or it appears that the failure to make provision was intentional and not occasioned by accident or mistake.

This may be made to appear by evidence outside of the will itself. In a case where a wife left a will which made no mention of her children, and gave her whole estate to her husband, the will was upheld upon evidence

¹ Pub. St. ch. 130, § 1.

² Pub. St. ch. 147, § 6 ; ch. 127, § 1.

³ St. 1892, ch. 118.

⁴ Pub. St. ch. 127, § 21.

that she was a woman of great intelligence and capacity, that she was fond of her children who were never separated from her, that she had great affection for and the most perfect confidence in her husband, and that he was very devoted to her.¹ The Supreme Court says: "To assume that she unintentionally omitted to provide for the child living when the will was made is to assume that she forgot that she had a child, which is incredible."

In spite of this decision, it is wise, if one intends to disinherit a child, to say so frankly in the will, as in another case another judge might take a different view of this same testimony.

When a child, born after his father's death, has no provision made for him by his father's will or otherwise, he takes the same share of his father's estate that he would have been entitled to if his father had died intestate,² unless of course it appears that the omission was intentional. This section of the statute by its terms applies only to a birth after a father's death. How would it be, where the child was born after the mother's death, by the Cæsarean

¹ Buckley v. Gerard, 123 Mass. 8.

² Pub. St. ch. 127, § 22.

process, so called, or other more modern surgical operation? Clearly its rights would not necessarily be protected by the previous section of the statute, because under the decision in *Buckley v. Gerard*, the omission could not be held to be by accident or mistake, as that would be to assume that she forgot she had a child in her womb.

It has been held that a wife is not a relation of her husband within the meaning of the statute which provides that a devise or legacy, if made to a child or relation who dies before the testator, shall go to the issue.¹ Nor is she included among his next of kin.² The word means a blood relation.³

A widow is not entitled to her dower in addition to the provisions of her husband's will, unless such plainly appears by the will to have been his intention;⁴ but such provision, if she accepts it, being in lieu of dower stands first in order of payment, and is to be paid to

¹ *Esty v. Clark*, 101 Mass. 36.

² *Haraden v. Larrabee*, 113 Mass. 430.

³ *Kimball v. Story*, 108 Mass. 385.

⁴ Pub. St. ch. 127, § 20.

her in full, even if there is not property enough to pay other legacies or devises.¹

The widow may, however, at any time within six months after the probate of her husband's will, file a written waiver of its provisions, and she shall then be entitled to receive the same portion of his estate that she would have received if he had left no will,² except that if she would thereby get more than \$10,000 of his personal estate, she takes \$10,000 absolutely, and the income of all exceeding that amount, a trustee being appointed by the Court to take care of the principal, upon application of any person interested.³

Subject to this right of waiver in the wife the husband may leave any part of his property, real and personal, away from her.

The wife may leave away from her husband one-half of her personal property, or the whole if he signifies his assent thereto in writing.⁴ She cannot, without his written consent, deprive him of his right in her real estate by the curtesy if they have had issue born alive; nor

¹ *Richardson v. Hall*, 124 Mass. 234; *Borden v. Jenks*, 140 Mass. 562.

² *Cochran v. Thorndike*, 133 Mass. 46.

³ Pub. St. ch. 127, §§ 18, 19.

⁴ Pub. St. ch. 147, § 6.

his right to one-half thereof if they have had no issue born alive, nor the further right to five thousand dollars' worth absolutely where no issue survives her.¹

Subject to these limitations, a wife may leave her estate, real or personal, to whom she pleases.

In case a married woman has been deserted by her husband, or is living apart from him for justifiable cause, and such facts are established by decree of a Court of competent jurisdiction, she may make a will in the same manner and with the same effect as if she were single, and may, either by will or deed, without her husband's consent, dispose of all her real and personal estate.²

In conclusion let me say that it is always wise to make a will, provided one does not undertake thereby to regulate the universe. A complicated and elaborate will rarely accomplishes its purpose, because no one, however acute, can foresee the future in all its possibilities. A simple will, on the other

¹ Pub. St. ch. 147, §§ 1, 6; St. 1885, ch. 255; St. 1887, ch. 290; St. 1889, ch. 204.

² St. 1884, ch. 301; St. 1885, ch. 255.

hand, if properly considered, is really necessary to do justice, especially by a husband to his wife.

It is not an uncommon thing to hear an otherwise kind and loving husband assert that he does not intend to make a will, that the law is common-sense, and that he is content to allow his property to go as the statutes provide. Nothing is more unfair, nor more illogical.

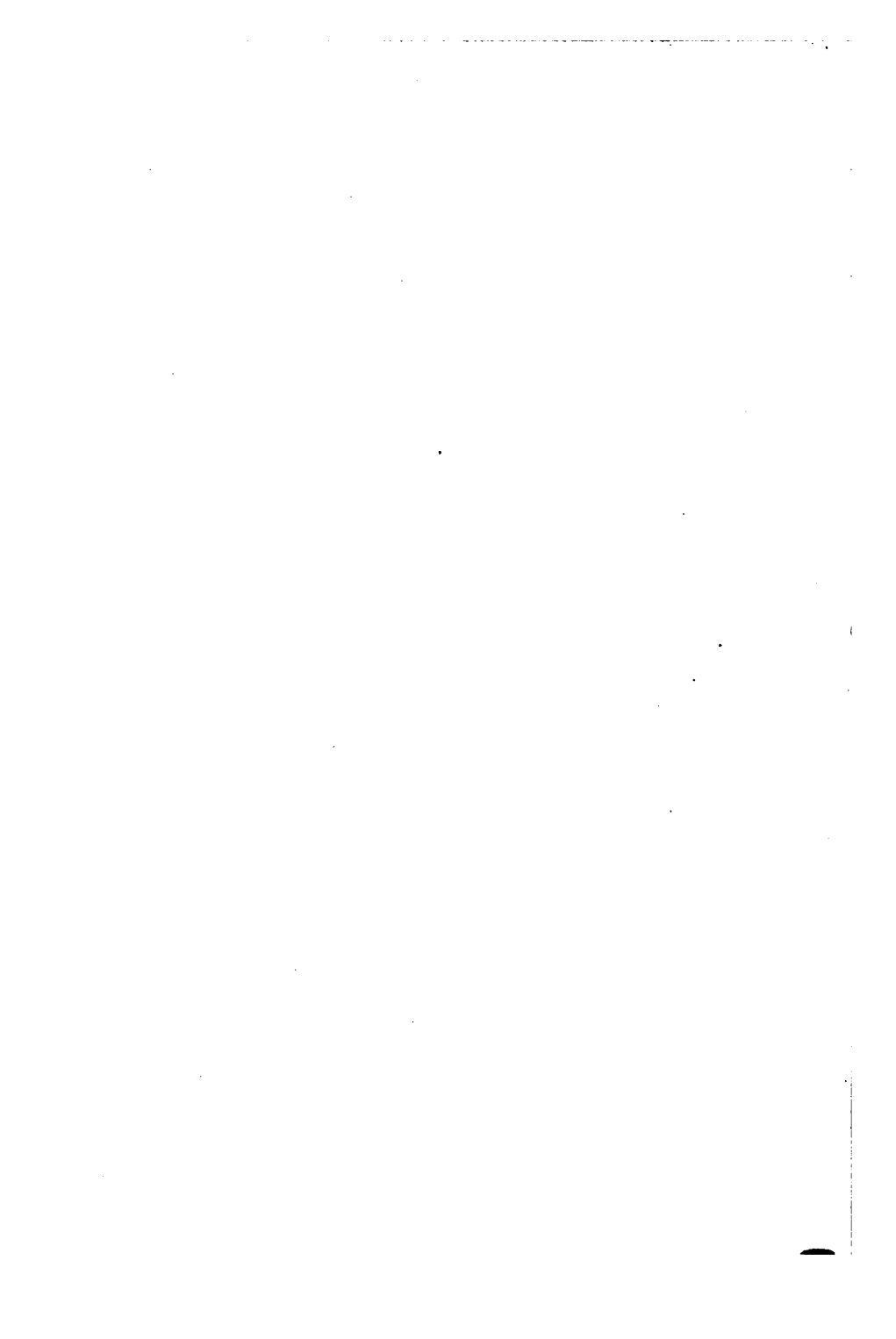
Presumably no husband desires his wife to be pecuniarily worse off after than before his death. He does not wish that his demise should cause her unnecessary suffering; but that is just what must happen, in nine cases out of ten, unless he provides to the contrary by will.

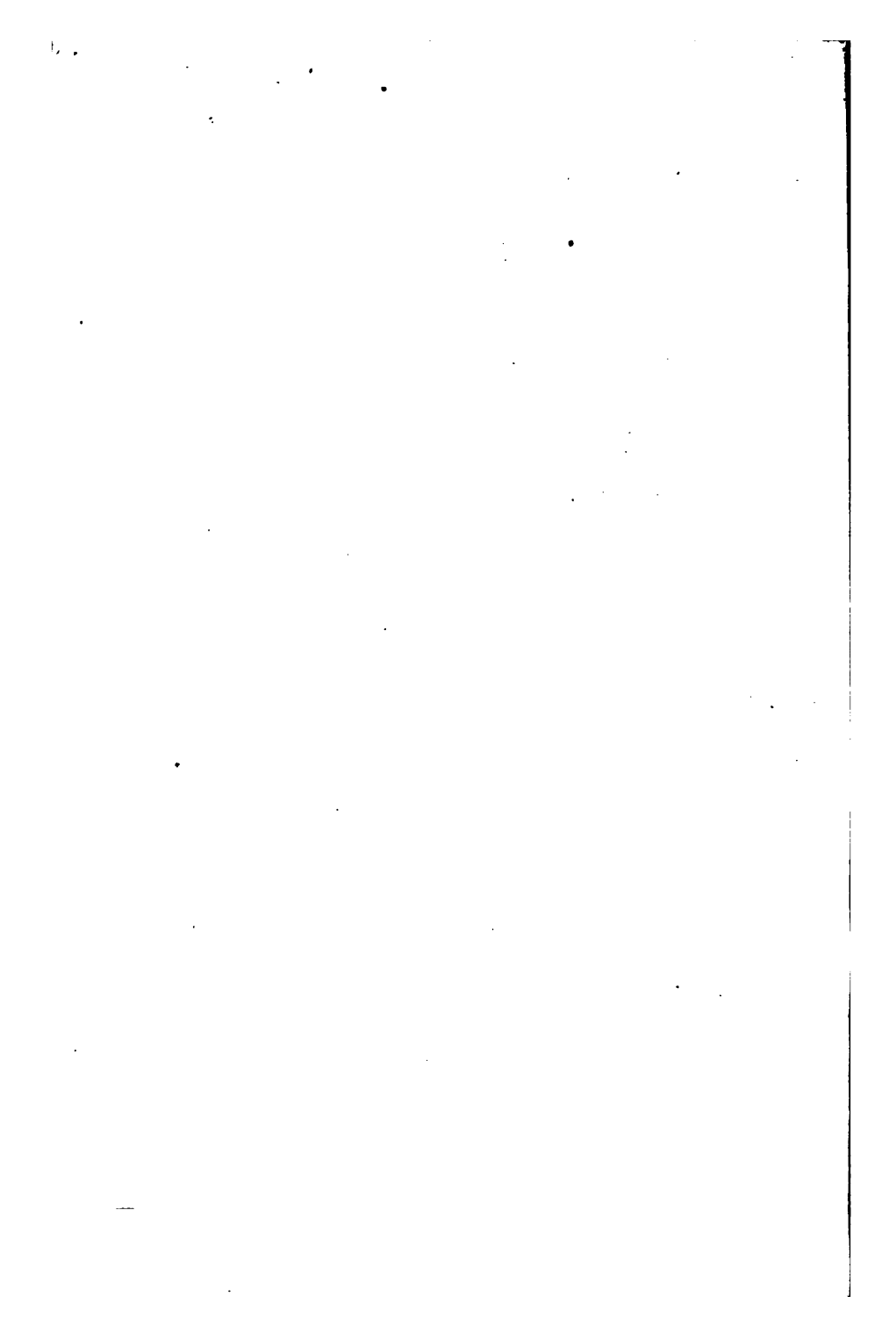
A man's income is usually derived from two sources, his personal earnings, and the yield from his investments. He needs them both to properly maintain his home.

At his death the item of personal earnings is at once eliminated. Death itself deprives his widow of this primary source of support. The law then deprives her of the larger part of the second source, — his investments. For example, a man has property which yields him

\$2500 a year; his salary is \$2500; his total income thus being \$5000. At his death his salary stops. This leaves but \$2500, the supposed income from his investments. Unless he is absolutely without kindred, however remote (which is rarely the case), the very largest share that the law gives his widow is, under the most favorable circumstances, one-half, or enough to yield her about \$1250. If there are children, her interest is still further reduced to one-third, or about \$800. So that a woman who, with her husband, has been living at the rate of \$5000 a year, may find herself at his death suddenly reduced to an income of between \$800 and \$1250, although he may leave property enough to make her comfortable for life did not the statute give it to his next of kin.

This is the law; but is it justice?





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